IN THE

SUPREME COURT OF THE UNITED STATES

Spring Term 1976

NO. 75-682

SHERMAN EUGENE CARTER,
Petitioner

v.

STATE OF NORTH CAROLINA
Respondent.

ON WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE RESPONDENT in opposit.

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RESPONSE OF RESPONDENT,
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PETITION FOR WRIT OF CERTIORARI

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 289 NC 372, _____ S.E. 2nd _____ (1976).

JURISDICTION

Petitoner seeks to invoke the jurisdiction of this Court pursuant to 28 USCA 1257(3).

QUESTIONS PRESENTED

I. Is the death penalty set forth in the laws of the State of North Carolina unconstitutional as set forth in North Carolina General Statute 14-17, because it is cruel and unusual punishment and contrary to the Constitution of the United States?

II. Did the trial court err in permitting the defendant to be tried, not by jury of his peers, but by a jury from which non-whites had been systematically excluded?

STATEMENT OF CASE

The petitioner has filed with this court a Petition for a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina in denying the defendant's Petition for Certiorari to review the trial court's alleged error in permitting the defendant to be tried by a jury from which non-whites had allegedly been systematically excluded. The petitioner has, also, requested this court to review the imposition of the sentence of death imposed upon him under North Carolina General Statute 14-17 for murder in the first degree.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT CARTER'S MOTION TO CHALLENGE THE CONSTITUTIONALITY OF NORTH CAROLINA'S DEATH PENALTY.

The petitioner asserts that the penalty of death is cruel and unusual punishment. He also urges that the revision of G.S. 14-17, through the removal of the jury's discretion in sentencing in capital cases, has not changed the cruel and unusual character of the death penalty as being violative of

the Eighth and Fourteenth Amendments to the Constitution of the United States.

This court has received briefs and heard oral arguments on this question as raised by the petitioner in the case of *State v. Woodson and Waxton*, No. 75-5491, 1976 Term. The petitioner's question, therefore, has, in essence, been accepted for hearing by this court. Therefore, any decision in this case concerning the cruel and unusual character of the death penalty should be dependant upon the outcome of the *Woodson* case, and the petition to grant certiorari in the present case should be denied.

II

THE TRIAL COURT DID NOT ERR IN PERMITTING THE DEFENDANT TO BE TRIED BY AN ALL-WHITE JURY.

The defendants hereunder present an insubstantial argument to the effect that the all-white jury in Mecklenburg County that tried these black defendants was constituted through systematic exclusion of blacks from the jury by the prosecutor's staff. This contention, of course, is based upon the premise that such jury panel, based on population ratios, would contain blacks had such systematic exclusion not occurred.

This argument has been repeatedly answered by the Supreme Court of North Carolina. Particularly would such argument contain no merit in the absence of the defendants proving affirmative acts of exclusion rather than their showing only population ratios as to race. In the recent case of *State v. Cornell*, 281 NC 20 at page 32 the Supreme Court of North Carolina made these observations:

> "(3) A person has no right to be indicted or tried by a jury of his own race or even to have a representative of his race on the jury. He does have the constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded.

State v. Yoes, 271 NC 616, 157 SE 2d 386; *State v. Wilson*, 262 NC 419, 137 SE 2d 109; *Swain v. Alabama*, 380 US 202, 85 S.Ct. 824, 13 L.Ed. 2d 759; *Gibson v Mississippi*, 162 US 565, 16 S.Ct. 904, 40 L.Ed. 1075....In instant case defendants contend that their showing that the black adult population in Forsyth County amounted to approximately 20% of the population of that County, when coupled with the testimony of the witness Foltz to the effect that during the biennum beginning January 1970 approximately 10% of the petit jurors appearing for service in the courtroom in which he was employed were Negro, made out a prima facie case of racial discrimination... The case of *Swain v. Alabama*, supra, strongly supports the State's argument... the United States Supreme Court held that the trial court properly denied defendant's motion to quash. Mr. Justice White delivered the Court's majority opinion, and Mr. Justice Goldberg, with whom Chief Justice Warren and Mr. Justice Douglas joined, delivered a separate dissenting opinion. The majority opinion, in part, stated:

'...We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%. See *Thomas v. Texas*, 212 US 278, 283, 53 L.Ed. 512, 514, 29 S.Ct. 393; *Akins v. Texas*; 325 US 398, 89 L.Ed. 1692, 65 S.Ct. 1276; *Cassell v. Texas*, 339 US 282, 94 L.Ed. 839, 70 S.Ct. 629...There is no evidence that the commissioners applied different standards of qualifications to the Negro community than they did to the white community. Nor was there any meaningful attempt to demonstrate that the same proportion of Negroes qualified under the standards being administered by the commissioners. It is not clear from the record that the commissioners even knew how many Negroes were in their respective areas, or on the

> jury roll or on the venires drawn from the jury box. The overall percentage disparity has been small, and reflects no studied attempt to include or exclude a specified number of Negroes.... We do not think that the burden of proof was carried by petitioner in this case.' *Swain v. Alabama*, supra, amply supports a holding under the facts of this case that the showing of underrepresentation of Negroes on the juries of Forsyth County was not sufficient to establish a prima facie case of racial discrimination."

A very definitive statement on this subject and directly in point with regard to the case at hand was made by this Court in the case of *State v. Yoes*, and *Hale v. State* reported at 271 NC 616 at page 632:

> "It is not required that the Negro race be represented on a jury panel in the same ratio to the toal membership as the Negro population of the County bears to the total population. *State v. Lowry* and *State v. Mallory*, 263 NC 536, 139 SE 2d 870; *State v. Wilson*, 262 NC 419, 137 SE 2d 109; *State v. Miller*, 237 NC 29, 74 SE 2d 513; 24 Am. Jur., *Grand Jury*, Sec. 27; 38 C.J.S., *Grand Juries*, Sec. 12. 'It is not the right of any party... to be tried (or indicted) by a jury of his own race, or to have a representative of any particular race on the jury. It is his right to be tried by a competent jury from which members of his race have not been unlawfully excluded.' Stacy, C.J. speaking for the Court in *State v. Koritz*, 227 NC 552, 43 SE 2d 77. To the same effect, see: *State v. Wilson*, supra; *State v. Miller*, supra; *State v. Speller*, 231 NC 549, 57 SE 2d 759; and *Thiel v. Southern Pacific Company*, 228 US 217, 90 L.Ed. 1181."

CONCLUSION

It is therefore respectfully submitted that the questions concerning the alleged systematic exclusion of non-whites from the defendant's jury has not been shown by the defendant nor has it been held by the Supreme Court of the United States that such a jury composition does establish a *prima facie* case of racial discrimination. The State would also contend that, inasmuch as the question of the constitutionality of the death penalty is already before this Court, the petitioner's *Petition For Writ of Certiorari* upon the cruel and unusual aspects of the death penalty should also be denied.

Respectfully submitted,

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